No. 84-1360

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

THE CITY OF RENTON, *et al.*,
Appellants,
v.
PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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MOTION TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF COUNTIES, THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION, THE UNITED STATES CONFERENCE OF MAYORS, THE COUNCIL OF STATE GOVERNMENTS, AND THE AMERICAN PLANNING ASSOCIATION IN SUPPORT OF A PLENARY HEARING AND REVERSAL OF THE DECISION BELOW

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QUESTION PRESENTED

May a city government require that "adult" motion picture theaters not be located where they would adversely affect children, schools, churches, property values and the quality of life, but instead be located in commercial areas more suitable for the showing of movies depicting explicit sexual acts?

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF COUNTIES, THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION, THE UNITED STATES CONFERENCE OF MAYORS, THE COUNCIL OF STATE GOVERNMENTS, AND THE AMERICAN PLANNING ASSOCIATION

Pursuant to Rule 36 of the Rules of the Court, *amici* respectfully move this Court for leave to file the attached brief *amicus curiae* in support of appellant City of Renton and its officials.[1]

The *amici* are organizations whose members include state, city and county governments and officials located

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[1] Appellants have consented to the filing of this brief. Appellees have not.

throughout the United States, and an organization comprised of city and regional planners and officials concerned with planning.

This case is of vital importance to *amici* and their members, because it presents constitutional issues affecting the power of government to regulate the permissible locations of "adult" motion picture theaters. The case thereby has an important impact upon the essential interest of state and local governments in protecting and preserving the quality of neighborhood life through effective land use planning. City officials have attempted to reconcile First Amendment values with traditional zoning principles, in accordance with this Court's guidance in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), *reh'g denied*, 429 U.S. 873 (1976). Decisions of the Ninth Circuit and other United States courts of appeals, however, overturning ordinances essentially similar to the Detroit ordinance upheld by this Court in *Young*, leave state and local governments in need of further instruction from this Court.

For these reasons, *amici* seek leave to file this brief to assist the Court in its consideration of this litigation.

Respectfully submitted,

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INTEREST OF THE AMICI

The interest of the *amici* is set forth in the motion for leave to file this brief.

STATEMENT OF THE CASE

This case concerns the effort of a small city to protect its neighborhoods by limiting the location of "adult" motion picture theaters which show sexually explicit films.[1]

Renton, Washington is a city of less than 35,000 population, situated south of Seattle on Lake Washington. The citizens of Renton, like those in many communities throughout the country, have tried to make their city "beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Berman v. Parker*, 348 U.S. 26, 33 (1954). Since April 1965, when Renton adopted its first comprehensive plan,[2] the city has

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[1] The "adult" movies at issue here were described in the decision of the State trial court. They were found to contain

> "a substantial content of highly repetitive, sexually explicit conduct, which includes masturbation, fellatio, cunnillingus, oral, anal and vaginal sexual intercourse, often occurring simultaneously and involving several people, repetitive ejaculation visibly displayed, to the body and usually to the face of female participants." They also contain "[s] ame sex activity . . . limited generally to women, [and] mixed groups of men and women such as two men and one woman or two women and one man or numerous people engaged in various activities simultaneously. . . ." Memorandum Decision, March 9, 1984, *City of Renton v. Playtime Theatres, Inc.*, Superior Court for the State of Washington for King County, No. 82-2-02344-2 at 21 (hereinafter Mem. Dec. Sup. Ct. Wash.).

[2] "The purposes of the comprehensive plan are: To improve the physical and social environment of the city as a setting for human activities—to make it more functional, beautiful, decent, healthful, interesting, and efficient; To ensure acceptable levels of access, utilities and other public services to future growth and development[;] To promote the public interest, and the interest of the city at large[;] To facilitate the democratic determination and implementation of City policies and developments; To effect coordination in development; To inject long-range considerations into the determination of short-range actions; and To provide professional and technical knowledge in the decisions affecting development of the City." City of Renton, *Comprehensive Plan Compendium* 3, January 1985, (available at City Hall, Renton, Washington).

"The overriding consideration is to promote public safety, welfare, and interest. Additional factors to be considered (not in order of priority) are preservation of property rights, protection of life and property, equal opportunities, public interests prevailing over private interests, and economic and social benefits. City of Renton, *Comprehensive Plan Compendium*, *supra* at 3.

worked to develop and maintain a community that is a good place to live.

Renton has retained much of its original downtown core area which contains not only "commercial uses, but single residences and church and school uses which have been, and continue to be, a part of the neighborhood." [3] As part of its comprehensive plan, Renton adopted area-specific plans including one for the central area of the city. That plan was developed and refined through "a process of field analysis, data gathering and public input, two public meetings and one public hearing" between 1979 and 1982.[4] The central downtown area was conceived as one providing for "sufficient retail services to accommodate the projected residential and employment population of the area." It also includes a "variety of housing opportunities, including single family and multiple family housing" for close-in living.[5] Development and redevelopment were planned along the Cedar River to maintain a recreational flavor in that portion of the community.[6]

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[3] Mem. Dec. Sup. Ct. Wash. at 5. The state court judge also noted that "[s]ubstantial recent investment in amenities is clearly evident and within a very close proximity of the theater, residences, businesses, schools and churches, there are also municipal buildings and a series of waterfront parks and recreational and civic use facilities. . . ." *Id.* at 5-6.

[4] City of Renton, *Comprehensive Plan Compendium*, *supra* at 61. In adopting specific ordinances, which form part of the comprehensive plan, the usual local government process of study, committee meetings, council meetings and public hearings was followed. For example, before the Council adopted the "adult" theater ordinance in question, the Planning and Development Committee held at least six meetings. Jurisdictional Statement of Appellants, at 5, fn. 4.

[5] City of Renton, *Comprehensive Plan Compendium*, *supra* at 62.

[6] *Id.* at 63.

As part of the effort to maintain the central area of the city as a good place to live, Renton adopted a number of zoning ordinances,[7] including one adopted in April, 1981, dealing with "adult" motion picture theaters. Patterned after the Detroit ordinance approved by this Court in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976),[8] the ordinance attempts to prevent the operation of "adult" motion picture theaters in areas close to schools, residences, churches and public parks. It was adopted after almost a year of study following public hearings at which the city council heard testimony and reviewed exhibits indicating the potential adverse effect of "adult" entertainment uses on property values and the social climate of business and residential areas of the city.

The ordinance,[9] which expressly relied on the adverse effects of "adult" motion picture theaters on neighborhoods in Seattle, Detroit and other cities, was adopted before any such use was established or, as far as anyone knew, contemplated in Renton itself. The District Court

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[7] *Id.* at 1. *See also*, Renton, Wash., Code, Chapter 7 of Title 4, Zoning, §§ 4-701 *et seq.* (available at Renton City Hall, Renton, Washington).

[8] The Renton ordinance, unlike the Detroit ordinance, provides only for civil, not criminal, penalties.

[9] The first ordinance, adopted in April 1981, contained the following definitions:

> "1. 'Adult Motion Picture Theater': An enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or characterized by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' as hereafter defined, for observation by patrons therein.
>
> "2. 'Specified Sexual Activities':
>
> (a) Human genitals in a state of sexual stimulation or arousal;
>
> (b) Acts of human masturbation, sexual intercourse or sodomy;

found that five hundred and twenty acres, or approximately five percent of the total land area, remained available for "adult" motion picture use.[10] The available land is zoned for commercial and industrial park uses and is adjacent to a freeway interchange. The area in question, the Valley Planning Area, is "a developing area of industrial, commercial, and office uses." It is to be "developed with a diversity of high quality industrial, commercial and office uses" and "should be the principal

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> (c) Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.
>
> "3. 'Specified Anatomical Areas'
>
> (a) Less than completely and opaquely covered human genitals, pubic region, buttock, and female breast below a point immediately above the top of the areola; and
>
> (b) Human male genitals in a discernible turgid state, even if completely and opaquely covered." App. L, 78a-79a, (References in this form are to the Appendix to the Jurisdictional Statement.

The ordinance prohibited "adult" motion picture theaters within 1000 feet of any residential zone or any single family or multiple family use, any church or any public park or park zone. It also prohibited such use within one mile of any public or private school. App. L, 99a. This latter provision was amended in May 1982 to prohibit "adult" theater uses within 1000 feet of any school, thus expanding the area available for such entertainment facilities. App. M, 87a. The amended ordinance also clarified the term "used" by defining it as

> "a continuing course of conduct of exhibiting 'specific [sic specified?] sexual activities' and 'specified anatomical areas' in a manner which appeals to a prurient interest." *Ibid.*

[10] The Court of Appeals questioned the validity of this finding. App. A, 13a-14a. *Amici* do not wish to engage in an evidentiary dispute, but note that the Court of Appeals' opinion implies that *some* area was in fact available for such use. Appellants' brief reviews the factual evidence and demonstrates persuasively that there was ample scope for adult entertainment uses commensurate with the size of the city of Renton, even if the available area was not at large as the District Court found.

growth area for these uses" within the city.[11] It is within 15 minutes driving distance of any area in Renton.

In January, 1982, Playtime purchased the Renton theater, knowing that it was within the area proscribed by the ordinance, for the admitted purpose of exhibiting "adult" motion pictures. Before completing its purchase, Playtime filed an action in federal court on January 20, 1982,[12] asking that the ordinance be declared unconstitutional and that its enforcement be permanently enjoined. On January 11, 1983, adopting the findings of a magistrate, the district court granted a preliminary injunction. App. A, 35a-36a. For the first time Playtime began showing adult movies at the Renton theater.

The parties stipulated to submit the case for a determination whether a permanent injunction should issue on the basis of the record already developed. On February 17, 1983, the district court denied the permanent injunction. App. 32a. Finding that 520 acres were available as potential sites for adult theater use, the court concluded that the ordinance did not substantially restrict First Amendment interests. The court also held that the city was not required to show specific adverse impact on Renton from the operation of adult theaters, but could rely on the experiences of other cities. Lastly, the court found that the purposes of the ordinance were unrelated to the suppression of speech and that the restrictions it

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[11] City of Renton, *Comprehensive Plan Compendium*, *supra* at 33. Only one small area is designated for heavy industrial use. *Id.* at 47.

[12] A month later, in February, 1982, Renton brought suit in state court seeking a declaratory judgment that the ordinance was constitutional on its face and alleging that an actual dispute existed because of Playtime's pending federal lawsuit asserting that the ordinance was unconstitutional. Renton also moved to dismiss Playtime's federal action on grounds of abstention. The federal district court subsequently ruled that abstention was improper. App. A, 4a.

imposed were no greater than necessary to further the governmental interests at stake.[13]

Playtime appealed, and the Ninth Circuit reversed. The Court of Appeals declared that it had an obligation to scrutinize strictly zoning decisions that infringe First Amendment rights. It disagreed with the district court as to the availability of land and concluded that the limited area allowed for "adult" theater uses would cause a substantial restriction on freedom of speech. Using the four-part standard of review set forth in *United States v. O'Brien*, 391 U.S. 367 (1968),[14] the Ninth Circuit subjected the district court's decision to *de novo* review as involving mixed questions of fact and law. The Court of Appeals conceded that, under the *O'Brien* test, the regulation was within Renton's constitutional power, but stated that Renton had not shown a substantial governmental interest in enacting the ordinance, as the ordinance itself contained only conclusory statements. The Ninth Circuit also found that Renton did not meet the

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[13] The state court complaint was later amended by Renton to seek abatement of the operation of the theater. The Superior Court judge used an advisory jury drawn from the King County jury pool, which represented a cross-section of individuals and backgrounds, to consider 10 films stipulated to be typical of those presented at the Renton theater by Playtime. The court applied the high standard of proof, *i.e.*, clear, cogent and convincing evidence, used in *C per v. Mitchell Brothers' Santa Ana Theatre*, 454 U.S. 90 (1981), *reh'g denied*, 456 U.S. 920 (1982), in determining that their exhibition should be abated. The state court judge held exhibition of the films submitted to the court as typical of those shown at the theater constituted "a nuisance per se, and an 'adult motion picture theater' as defined" in the ordinance and shrould be abated. Mem. Dec. Sup. Ct. Wash. at 40.

[14] The test is: "[A] governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. at 377 (1968).

third prong of the *O'Brien* test, as Renton "has not proved that the regulation is unrelated to the suppression of speech." The court never reached the fourth prong of the test to determine whether "the incidental restriction on First Amendment freedom is no greater than essential to further [Renton's governmental] interest."

SUMMARY OF ARGUMENT

1. This case is of paramount importance to state and local officials all across the nation. They are concerned with community planning aimed at preserving the quality of life in urban neighborhoods. Their efforts to achieve this purpose through the use of zoning were approved by this Court in *Young*, where the Court ruled expressly that a city's zoning power allows enactment of ordinances which regulate the location of "adult" theaters showing sexually explicit films. But despite the ruling in *Young*, the decisions of the courts of appeals in this and other cases cast doubt on the ability of a city to exercise its zoning power to regulate the location of "adult" theaters.

Unlike this Court, the Ninth Circuit declined to recognize the important community interest in preserving the quality of urban life, and struck down the Renton ordinance as allegedly lacking substantial government interest and being suppressive of free speech. The court below failed to recognize that the ordinance does not prevent the communication or reception of any ideas, but simply limits the places where "adult" films may be exhibited.

2. The Ninth Circuit opinion imposes a difficult evidentiary burden on local governments seeking to protect children, schools, churches, and residential neighborhoods from the anticipated adverse effects of "adult" uses. The burden demanded by the Ninth Circuit is inconsistent with the views of this Court in *Young*. Furthermore, the precise requirements of the burden are undefined, so that cities are left in doubt as to what investigation and study must be undertaken before adopting zoning regulations

reasonably designed to forestall the problems attendant upon "adult" entertainment uses.

3. The Ninth Circuit opinion is also inconsistent with decisions of this Court involving zoning regulations which carry out aesthetic goals. Such regulations have been upheld even though incidental limits are imposed on First Amendment rights.

4. Finally, *amici* believe abstention would have been proper in this case. The lower courts' failure to abstain gives sanction to an unseemly race to the courthouse engaged in by appellees, and creates an anomalous situation in which the Renton ordinance has been struck down in federal court while an almost identical ordinance of the sister city of Seattle has been upheld by the highest state court.

ARGUMENT

I. THIS CASE PRESENTS IMPORTANT ISSUES WHICH REQUIRE PLENARY HEARING AND DECISION BY THIS COURT

A. Introduction

This case is one of great national importance. All across the country, cities, counties and states have been engaged in comprehensive efforts to improve the quality of life for people.[15] Land use planning, environmental laws and historic preservation are but means to achieve the goal of making communities desirable places to live.[16]

It is well settled that under the police power, a city can zone to protect its neighborhoods and promote "public safety, public health, morality, peace and quiet, law and order." *Berman v. Parker*, 348 U.S. 26, 32 (1954).[16]

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[15] The reference to "cities" in this brief should be read as including other general purpose units of state and local governments, many of which have adopted zoning ordinances similar to that in question. F. Strom, *Zoning Control of Sex Businesses* 1 (1977).

[16] The reason for this government effort is plain. As this Court noted in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926):

As part of this effort to improve the quality of life, cities have attempted to limit the adverse impact on the land values and quality of life of the surrounding community caused by the proliferating "adult" entertainment industry. Anyone who has visited a major city in the last few years is well aware that "adult" entertainment uses affect the general quality of life.[17] Since the Court's decision in *Young*, many cities have enacted zoning ordinances patterned after the Detroit ordinance upheld by the Court in that case.[18]

"Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities."

Local land use regulations rationally related to legitimate governmental objectives and which do not violate the just compensation clause are usually sustained. Thus, *Berman, supra*, held that it was within the power of the legislative branch to take into account aesthetic as well as health considerations. *See Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (zoning laws not invalid exercise of police power). *See also Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) (comprehensive plan preserving structures of historic or aesthetic interest not discriminatory nor a "taking"); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (upholding ordinance limiting land use to one-family dwellings).

[17] Clor, *Public Morality and Free Expression: The Judicial Search for Principles of Reconciliation*, 28 Hastings L.J. 1305, 1306 (1977).

[18] Marcus, *Zoning Obscenity: Or, the Moral Politics of Porn*, 27 Buffalo L. Rev. 1 (1978). *See Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980), sustaining zoning ordinance restricting location of adult theaters; *see also, City of Norfolk v. Tiny House, Inc.-Mom's Restaurant*, 222 Va. 414, 218 S.E.2d 836 (1981), upholding zoning ordinance requiring a use permit for adult uses within 1000 feet of other adult uses; *City of Minot v. Central Ave News, Inc.*, 308 N.W.2d 851 (N.D. 1981), sustaining restriction on location of adult entertainment center where there was substantial area available for operating such a center; *Contrast, Marco Lounge, Inc. v. City of Federal Heights*, 625 P.2d 982 (Colo. 1981), striking down zoning ordinance confining adult entertainment to "entertainment districts" which were not provided for within city limits.

In *Young*, the Court approved a zoning ordinance that treated "adult motion picture theaters" as a "regulated use" and limited the area in Detroit in which such theaters could be located. The Court's holding, 427 U.S. at 62—"The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances"—carefully balanced a concern with the communal quality of city life with the interest in preserving First Amendment values and protecting the free dissemination of ideas.

Relying on the decision in *Young*, and concerned with the spread of enterprises which have contributed to neighborhood deterioration and blight, many cities have enacted laws zoning the location of "adult" motion picture theaters. Although these ordinances have often been upheld by state supreme courts, only one has been sustained by a federal court of appeals, and several others have been struck down by federal courts of appeals.[19] The conflict in these decisions demonstrates confusion concerning the meaning and effect of the *Young* decision. At this point, cities and counties need further guidance from the Court as to how they may protect their neighborhoods, family life, and children from urban blight without transgressing First Amendment limitations.

The need for guidance is illustrated by the background of this case. The city of Renton, as part of its overall effort to maintain a desirable and wholesome community, began to study the regulation of "adult" entertainment land uses. Renton had no "adult" motion picture theaters but was aware that such uses, unregulated, had had adverse impacts elsewhere, on neighborhoods, on children, and on property values. Therefore, the Renton City Council, its Planning and Development Committee, and the office of the City's acting Planning Director under-

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[19] *See Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980), and cases cited in appellants' Jurisdictional Statement, p. 12, fns. 23, 24, 25, 26.

took an extensive study of the problem. After soliciting information from the community, and holding public hearings, the Council drafted an ordinance patterned on that upheld by this Court in *Young*.[20] Yet, though the ordinance was sustained by the federal district court, it was struck down by the Ninth Circuit as lacking substantial government interest and suppressive of free speech.

B. The Ninth Circuit Opinion Below Leaves Doubt As To What Evidence of the Adverse Effects of "Adult" Theaters Would Meet Its Test of Constitutionality

In its opinion, the Ninth Circuit acknowledged that Renton was not required to permit the operation of "adult" theaters in order to document their effects in its own community before undertaking their regulation. But the court left wholly undefined the nature of the evidence necessary to substantiate a restriction on such land use. Playtime's motion to affirm suggests that Renton had a duty to undertake an investigation of circumstances in other cities to determine whether their environment was sufficiently similar to that of Renton to make their experiences relevant. Such a requirement is obviously onerous and impractical, in terms of financial and personnel resources, for a small community. In *Young*, 427 U.S. at 55, this Court placed reliance on several scholarly and empirical studies in upholding Detroit's restriction on "adult" entertainment land uses. Yet the Ninth Circuit's opinion appears to preclude similar reliance by a city seeking to frame a reasonable standard for the permitted operation of "adult" theaters.

Moreover, the Ninth Circuit, while disapproving the District Court's finding of the extent of the land left available by Renton's plan for "adult" exhibitors, offers no guidance concerning the geographical extent to which such use must be permitted, either in terms of actual acreage, or in terms of a percentage of the area of the

[20] See Appendix to Jurisdictional Statement of Appellants, App. O, P, Q, R and S for the Detroit and Seattle Ordinances.

city as a whole, or of the area open to entertainment uses generally.

This Court, in *Young*, made it plain that some restriction on the freedom to exhibit "adult" movies is constitutionally permissible in the interest of preserving other important community values including "the present and future character of its neighborhoods." 427 U.S. at 72. Cities urgently need more specific guidance, so that they may tailor such restrictions to community needs without running afoul of the First Amendment.[21]

C. The Decision Below is Inconsistent with this Court's Opinion in *Young v. American Mini Theatres, Inc.*

In ruling that the City of Renton had not shown a substantial governmental interest in restricting "adult" entertainment, and that Renton had "not shown that it was not motivated by a desire to suppress speech based on its content," [22] the Ninth Circuit reached a result inconsistent with the Court's test in *Young*.

[21] The Ninth Circuit also rejected a similar ordinance in *Kuzinich v. County of Santa Clara*, 689 F.2d 1345 (9th Cir. 1982), because of "very little evidence bearing on the concentration of adult enterprises," despite the county's expressed concern for complaints about traffic and littering. And in *Ebel v. City of Corona*, 698 F.2d 390 (9th Cir. 1983), the court rejected the findings of the federal district court that alternative sites for adult bookstores existed in Corona and remanded for "proof of likelihood of some harm." Cities have cause to wonder whether *any* ordinance and *any* evidence would meet the Ninth Circuit standards.

[22] The Ninth Circuit opinion errs in "inferring that a motivating factor behind the ordinance was suppression of the content of the speech." 748 F.2d at 537. To reach its result, the court glossed over the findings of the ordinance by finding a motive for the ordinance in expressions of dislike for the subject matter. Undertaking an inquiry on the legislative motive is "a hazardous matter." *United States v. O'Brien*, 391 U.S. 367, 384 (1968). It is especially hazardous in the context of public meetings where all and sundry are invited to address their government. To infer an intent on the part of the City of Renton to suppress First Amendment rights from such statements is illogical and, on the facts of this case, wrong.

The Ninth Circuit's opinion is peppered with references to *Young*, but minimizes this Court's holding in that case that the interests furthered by such an ordinance are important and substantial. As Justice Stevens, speaking for this Court, said: "[T]he city's interest in attempting to preserve the quality of urban life is one that must be accorded the highest respect." 427 U.S. at 71.[23] The Ninth Circuit, by contrast, glossed over Renton's substantial interest in preserving the quality of life in the community, and focused instead on the fact that Renton "does not solve the problem in the same manner" as Seattle and Detroit. Detroit, for example, required dispersal of adult theaters, whereas the ordinance in Renton would result in their concentration. But, in *Young*, this Court gave no indication that the specific solution adopted by Detroit was the only acceptable way to deal with the problem. The opinion drew no such line. To the contrary, the Court intended that cities would be free to experiment with solutions adapted to their own communities. The opinion specifically noted that:

> " . . . [W]e have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the city." 427 U.S. at 62.

The Court added:

> "It is not our function to appraise the wisdom of its [the Detroit City Council's] decision to require adult theaters to be separated rather than concentrated in the same areas . . . . [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.* at 71.

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[23] *See* also concurring opinion of Justice Powell: "Without stable neighborhoods, both residential and commercial, large sections of a modern city quickly can deteriorate into an urban jungle with tragic consequences to social, environmental, and economic values". *Id.* at 80.

The Ninth Circuit opinion also ignores the reasoning in Justice Powell's concurring opinion in *Young*.[24] Justice Powell termed it "undeniable" that " a zoning ordinance that merely specifies where a theater may locate, and that does not reduce significantly the number or accessibility of theaters presenting particular films, stifles no expression." [25] *Young*, 427 U.S. at 81, fn 4. He also stated ". . . the dissent misconceives the issue in this case by insisting that it involves an impermissible time, place, and manner restriction based on the content of expression. It involves nothing of the kind." Rather, it involves only the government's right to "tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated." [26]

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[24] Justice Powell pointed out that "zoning, when used to preserve the character of specific areas of a city, is perhaps 'the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.'" *Young*, 427 U.S. at 80, citing *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974).

[25] "The burden . . . is no different from that imposed by more common ordinances that restrict to commercial zones of a city movie theaters generally as well as other types of business presenting similar traffic, parking, safety, or noise problems. After a half century of sustaining traditional zoning of this kind, there is no reason to believe this Court would invalidate such an ordinance as violative of the First Amendment. The only difference between such an ordinance and the Detroit ordinance lies in the reasons for regulating the location of adult theaters. The special public interest that supports this ordinance is certainly as substantial as the interests that support the normal area zoning to which all movie theaters, like other commercial establishments, long have been subject." *Id.* at 80, fn 3.

[26] *Id.* at 81, fn. 6. Regulations have been upheld which ban demonstrations in or near court houses, *Grayned v. City of Rockford*, 408 U.S. 104 (1972); limit the use of sound trucks, *Kovacs v. Cooper*, 336 U.S. 77 (1949), *reh'g denied*, 336 U.S. 921 (1949); and ban overlapping parades, *Cox v. New Hampshire*, 312 U.S. 569 (1941).

Like Detroit, Renton has "silenced no message, has invoked no censorship, and has imposed no limitation upon those who wish to view ['adult' films.]" *Young*, concurring opinion of Justice Powell at 78-79. The Renton ordinance is addressed only to the *places* at which this type of expression may be presented, a restriction that does not interfere with content.[27]

D. Unlike the Decision in Young, the Ninth Circuit Result Establishes an Impossible Standard

The Ninth Circuit opinion leaves cities with a Hobson's choice. As required by the court below, there are only two ways for a city which lacks "adult" theaters to gather evidence on secondary harms from such enterprises. The city may permit entry of such theaters and allow the decay which has accompanied them in many other cities to set in, or the city may commission studies and hire experts to predict the effects of "adult" theaters on its community.

To wait for the harm to occur is exactly what wise urban planning seeks to avoid. Nor is waiting mandated by any decision of this Court. The very purpose of city planning is to foresee and prevent the evils which can arise from conflicting or potentially harmful land uses rather than to permit their occurrence before seeking a remedy. In the area of planning and zoning, cities learn from the

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[27] In addition to the area available for their exhibition in Renton itself and in neighboring Seattle, the movies in question are available as video cassettes at three video rental and sale establishments within the City of Renton: Mary's Commodore Video Rentals, Sunset Video, and Star Video.

Also, an estimated 20 percent of the U.S. adult population own VCR machines. As a recent article in *Newsweek* noted, these films are widely available. A *Newsweek* poll indicates nine percent of all Americans bought or rented an X-rated cassette within the last year. *Newsweek*, March 18, 1985, at page 61. Such X-rated films are also available by mailing according to advertisements in such magazines as *Hustler* and *Oui*.

experience of other cities. Indeed, model zoning codes are promulgated for that very purpose.[28] The city need not await deterioration to act. *Genusa v. City of Peoria*, 619 F.2d 1203, 1211 (7th Cir. 1980). The Renton ordinance, like those in many cities, was designed to protect and preserve the quality of its neighborhoods and commercial districts from foreseeable blight. To await the advent of adverse effects in each community before taking action is akin to insisting that Skyline Towers must collapse in one's community before building regulations can be changed.

Under the Ninth Circuit's decision, the only alternative to passive acceptance of urban blight would be to commission a study of the potential effects of adult theaters in each concerned community. Such a study, however, would be not only costly and time consuming for a small city like Renton, but also redundant. Any such study would be cumulative of existing studies which predict the potential harmful effects of "adult" entertainment uses based on the opinions of experts and the experience of other cities.[29]

Instead, Renton chose the direct course. As stated in the ordinance, the Council relied on published studies and on the experience of other cities.[30] Significantly, the Council gave special consideration to the situations in Seattle and Tacoma, cities which are located in the same metropolitan area as Renton itself. The opinion of the Ninth Circiut supplies no rationale for rejecting the rele-

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[28] Nichols, *Cyc. Legal Forms*, §§ 9.5026 *et seq.*; F. Strom, *Zoning Control of Sex Businesses* (1977).

[29] For example, in *Young*, this Court referred to "the opinion of urban planners and real estate experts" that the concentration of adult uses in the same neighborhood "tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere." 427 U.S. at 55.

[30] Appendix to Jurisdictional Statement, App. M and N.

vance in Renton of the adverse effects of "adult" entertainment uses experienced in Seattle, Tacoma or Detroit.

E. The Ninth Circuit Decision is Inconsistent with Other Opinions of this Court

The Ninth Circuit decision, moreover, is inconsistent with other opinions of this Court. In *Los Angeles v. Taxpayers for Vincent*, —— U.S. ——, 104 S. Ct. 2118 (1984), this Court, reversing the Ninth Circuit, upheld an ordinance which affected the First Amendment rights of those wishing to post signs on public property.[31] The Court concluded that prohibiting the posting of political and other signs on utility poles did not significantly compromise First Amendment values. The opinion found it well settled that the state may legitimately exercise its police powers to advance aesthetic values. *Los Angeles v. Taxpayers for Vincent, supra*, 104 S. Ct. at 2129.[32] If a city, for aesthetic purposes, may zone land uses connected with such important societal values as communication of political ideas, the same authority clearly should extend to uses, akin to obscenity, which lie at the fringes of First Amendment protection.

II. THE NINTH CIRCUIT'S FAILURE TO ABSTAIN LED TO AN ANOMALOUS RESULT

The decision below presents another serious problem which *amici* wish to call to the Court's attention but which has not been raised by appellant in its jurisdictional statement. The Ninth Circuit ruled, without explanation, that "abstention is inappropriate in this case."

Without questioning appellants' decision not to present the abstention issue to this Court, *amici* would point out that it offers another reason for the Court to take

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[31] *See also Metromedia, Inc. v. City of San Diego*, 458 U.S. 490 (1981).

[32] *See also Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); and *Berman v. Parker*, 348 U.S. 26 (1954).

jurisdiction in this case. The First Amendment standards set forth by this Court in *Young* apply to *all* courts in this country, whether state or federal. Yet here two courts, one state and one federal, both with jurisdiction over events in the state of Washington, arrived at diametrically opposite decisions on virtually indistinguishable facts. The Supreme Court of Washington in its decision in *Northend Cinema v. City of Seattle*, 90 Wash.2d 709, 585 P.2d 1153 (1978), upheld a Seattle "adult" motion picture ordinance limiting the area for such uses, in a city of nearly half a million, to an area of approximately 250 a holding, it would be consistent with established law acres. The Ninth Circuit, by contrast, struck down the Renton ordinance, which left an area twice as large as Seattle's available for "adult" theaters. Such diverse results based on essentially similar facts can only encourage a race to the courthouse in search of a favorable forum.

Thus, in this case Playtime filed a pre-enforcement challenge in the federal court before even completing its purchase of the theater. Playtime's preemptive strike in federal court occurred before the city even knew of the plans to show "adult" movies, and obviously before the city could file an enforcement proceeding in state court. Such tactics can also be used by other theaters all across the country.[33] Without abstention by the federal courts, the result is to oust state court jurisdiction and to undermine this Court's oft-stated doctrine of deference to appropriate state tribunals. Where a state court has pre-

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[33] This is emphasized by the fact that Playtime Theatres was one of the unsuccessful litigants in the *Northend Cinema* case in which the Supreme Court of Washington upheld the Seattle ordinance. Since then, Playtime has consistently filed its litigation in federal court. *Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135 (9th Cir. 1980), *aff'd* 454 U.S. 1022 (1981); *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482 (9th Cir. 1984), *app. pending*, U.S. Sup. Ct. Nos. 84-28, 84-143 (argued Feb. 20, 1985); *Playtime Theatres, Inc. v. City of Tacoma*, 9th Cir., No. 81-3544 (unpublished decision, Oct. 25, 1982); *Playtime Theatres, Inc. v. City of Bremerton*, U.S. D.C., W.D. Wash., No. C-81-193V.

viously ruled on the validity of laws regulating the location of "adult" theaters, failure of federal courts to abstain can result in opposite rules of law being followed, as has occurred here. This is unseemly and anomalous. The effect is "one rule in Athens and another rule in Rome." [34]

This pattern suggests to *amici* that the abstention doctrine set forth in *Younger v. Harris*, 401 U.S. 37 (1971), should apply to cases such as this, where vital state interests are involved, and state law does not bar the interposition of the constitutional claim. *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, —— U.S. ——, 102 S.Ct. 2515, 2521 (1982). The outcome of virtually identical cases from communities located side by side should not depend on an unseemly legal scramble for a sympathetic court.

CONCLUSION

In the light of the Ninth Circuit's opinion, further guidance is needed by communities struggling with a problem of significant societal dimensions, involving substantial neighborhood deterioration. Thus *amici* urge the Court to grant appellants' request for plenary hearing.

Respectfully submitted,

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[34] *Laird v. Tatum*, Memorandum of Justice Rehnquist, 409 U.S. 824 (1972).